Chong Siew Lee v Lau Mun Chong

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO S1-24-781 OF 1994
LOW HOP BING JC
11 NOVEMBER 1994

Family Law *— Children — Custody — Whether wife should be given custody of younger child — Rebuttable presumption in favour of custody to wife — Displacement of rebuttable presumption by facts of particular case — Conduct of wife — Husband had greater role in looking after child — Welfare of child of paramount importance — Law Reform (Marriage and Divorce) Act 1976 s 88*

The plaintiff applied for an order that she be given custody of the two children of her marriage. An order in respect of the elder child for custody in her favour with access to the defendant had already been made with the consent of the defendant. The plaintiff left the matrimonial home voluntarily and did not deny her association with another man. She had been coming home very late at night and had dabbled in the share market which had put her in debt. The plaintiff's role in looking after both children, especially the younger, was negligible, whilst the defendant spent much time with them. The defendant did not dispute the custody order in respect of the elder child.

Held, dismissing the application:

Even bearing in mind the rebuttable presumption in favour of the wife in s 88 of the Law Reform (Marriage and Divorce) Act 1976, it was not in the interest of the younger child for his custody to be given to the plaintiff. The defendant was a more suitable person to be given custody of the younger child. The orders in respect of the elder child was not disturbed and were confirmed.

[Bahasa Malaysia summary

Plaintif memohon untuk satu perintah bahawa beliau diberi jagaan dua orang anak perkahwinannya. Satu perintah berkenaan dengan anak yang lebih tua memberikan jagaan kepada plaintif dengan akses kepada defendan telah pun dibuat dengan persetujuan defendan. Plaintif telah meninggalkan kediaman suami isteri secara sukarela dan tidak menafikan hubungannya dengan seorang lelaki lain. Beliau balik larut malam dan berurusan di pasaran saham yang telah mengakibatkannya beliau berhutang. Peranan plaintif dalam menjaga anak-anaknya, lebih-lebih lagi anak yang bongsu, adalah boleh diabaikan, sementara defendan menghabiskan banyak masa bersama mereka. Defendan tidak mempertikaikan perintah jagaan berkenaan dengan anak yang lebih tua.

Diputuskan, menolak permohonan itu:

Walaupun mengambil ingat akan anggapan yang boleh dipatahkan yang memihak kepada isteri di dalam s 88 Akta Membaharui Undang-Undang (Perkahwinan dan Perceraian) 1976, bukanlah dalam kepentingan anak yang bongsu jika jagaannya diberikan kepada plaintif. Defendan adalah orang yang lebih sesuai untuk mendapat jagaan ke atas anak yang bongsu. Perintah berkenaan dengan anak yang lebih tua tidak diganggu dan ditetapkan.]

Notes

For cases on custody, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) para 1832.

Cases referred to

Helen Ho Quee Neo v Lim Hui Peng [1974] 2 MLJ 51 (folld)
Lee Soh Choo v Tan Ket Huat [1987] 1 MLJ 255 (folld)
Tan Siew Kee v Chua Ah Boey [1983] 3 MLJ 20 (folld)
Teh Eng Kim v Yew Peng Siong [1977] 1 MLJ 234 (folld)

Legislation referred to

Law Reform (Marriage and Divorce) Act 1976 s 88

Balwant Singh Sidhu (*Suria Kumar & Yogan Sivam*) for the plaintiff.
SC Yong (*SC Yong & Associates*) for the defendant.

Cur Adv Vult

Low Hop Bing JC: This application in encl 1 is filed by the plaintiff for an order that she be given custody of the two children of her marriage (to the defendant).

The plaintiff and the defendant were married by way of civil registration on 28 September 1985. The first child of the marriage, a girl, Mi Tze, was born on 18 February 1986. Unhappy circumstances led to their separation in March 1986. The plaintiff took the baby girl to her parents' house. The defendant obtained an order for access to the baby girl on 1 December 1987. Their matrimonial difficulties were referred to the Marriage Tribunal which held six separate meetings in 1988 but the tribunal failed to reconcile the couple, which the tribunal confirmed vide Form P22 on 21 September 1988.

Both parties subsequently attempted reconciliation in September 1989. The couple stayed in the wife's parents' home for one year before moving back to the matrimonial home, which is owned by the defendant's parents. Although both parties were living together from September 1989, the plaintiff went ahead with her application for custody of the daughter to which the defendant consented and the custody order was made on 28 October 1989.

A The second child, a son, was born on 3 September 1992. On 23 September 1994, the plaintiff left the matrimonial home, without any prior warning to the defendant or the in-laws. The plaintiff was seen by the mother-in-law, a 71-year-old woman, packing up her personal effects and taking away as many articles as possible. At the material time, they were the only two persons at home. The defendant's mother B had to slip out of the house to make a telephone call to the defendant, as the house telephone has been disconnected by the plaintiff. On rushing home, the defendant found the police there, as the plaintiff had reported that she was 'detained' in the house. A lorry was also there to cart away the plaintiff's personal effects. After the plaintiff had left the C house, the defendant, through his solicitors, wrote to the plaintiff enquiring about her plans, but there was no reply.

The defendant is the only son. He has an elder sister who is married but childless. The defendant's father, aged 73, works on a part-time basis, while his mother looks after the household cleaning, cooking D and doing all the chores of a housewife, there being no maid at home. The plaintiff has neither the time nor the inclination to do the usual chores in the house.

The defendant's father helps to bring home Yishern from the babysitter in the evening, while the defendant's mother is always at home to receive Mi Tze, who comes home at around 4.30pm each day. E Mi Tze is in a school that practises a single-session teaching scheme and students have to stay until around 4pm. The defendant's sister and her husband love Mi Tze and Yishern and adore them, and treat them like their very own.

Mi Tze is in Standard 2 at SRJK (C) Chung Kwok in Kuala F Lumpur. Yishern is two years old. Yishern is looked after during the day by a nanny who has deposed that she would continue to do so. The plaintiff's role in looking after the children especially Yishern is negligible. On the other hand, the defendant spends numerous hours with the children each evening, playing with them, feeding them and sending G them to bed and takes the trouble to shop for the children's necessities. The defendant has shown himself to be an extremely selfless and loving father by providing for the children's care and welfare. In relation to the custody for Yishern, I am mindful of the rebuttable presumption in s 88 of the Law Reform (Marriage and Divorce) Act 1976 in favour of the wife (plaintiff). (For the purposes of this judgment, unless the context H otherwise requires, a reference to a section is a reference to a section in this Act.) Being a rebuttable presumption, it may be displaced by the facts of each particular case, eg in the instant case, the son has always enjoyed the comfort, safety, love and warmth of the matrimonial home. Yishern has never stayed away from home for long periods of time and I is well looked after, during the day, by the same nanny since he was seven weeks old. The defendant's love, care and attention for Yishern gives Yishern a sense of security. The defendant looks after him, plays with him and sleeps with him at night. The defendant has always been

willing and able to look after Yishern. He has sacrificed his social life, for the sake of Yishern's welfare which is of paramount importance. A

It is demonstrably clear from the affidavits filed herein that the plaintiff left the matrimonial home voluntarily. There is no medical evidence to substantiate the plaintiff's allegations of physical abuse by the defendant. The defendant was ready, able and willing to be cross-examined in open court concerning his role both as a husband and as a father, but the plaintiff has not availed herself of this opportunity. The plaintiff has not denied her knowledge and association with a man called Richard Ng. The plaintiff has been coming home very late at night. The defendant has, in his affidavits, averred that the plaintiff's dabbling in the share market has totally destroyed her as a person and put her in debt. In the light of the above circumstances, there is no doubt in my mind that it is not in the interest of Yishern for his custody to be given to the plaintiff. B C

Mi Tze has been living with both the plaintiff and the defendant since September 1989, and Yishern since birth. Yishern has always enjoyed the warmth and security of the matrimonial home. The defendant has consistently taken care of Yishern while awaiting the return of the plaintiff. D

Section 88(2) provides that:

> in deciding in whose custody a child should be placed, the paramount consideration shall be the welfare of the child and subject to this the court shall have regard: E
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> (a) to the wishes of the parents of the child; and
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> (b) to the wishes of the child, where he or she is of an age to express an independent opinion. F

Section 88(3) specifically provides that in deciding whether that presumption applies to the facts of any particular case, the court shall have regard to the undesirability of disturbing the life of a child by a change of custody.

In considering the welfare of a child, I have taken into account the general well-being of the child and all aspect of his upbringing, religious, moral as well as physical: *Tan Siew Kee v Chua Ah Boey* [1983] 3 MLJ 20. A loving parent with a stable home is conducive to the attainment of such well-being and so the defendant who loves Yishern and can provide a stable home and is concerned with Yishern's welfare should be given custody thereof. G H

In *Teh Eng Kim v Yew Peng Siong* [1977] 1 MLJ 234 it was said that, 'No parent has a prior right.' In the instant case, in addition to the welfare of the child, I also take into account the conduct and character of the parties. See also *Helen Ho Quee Neo v Lim Hui Peng* [1974] 2 MLJ 51. I

In the light of the above finding of facts, I hold that the defendant is a more suitable person to be given custody of Yishern.

A In *Lee Soh Choo v Tan Ket Huat* [1987] 1 MLJ 255, Siti Norma Yaacob J (as she then was) dismissed the application of the applicant-wife because she could not show that she will be able to devote her full attention to the children.

Pursuant to orders of the court dated 1 December 1987 and
B 28 October 1989, custody of Mi Tze was given to the plaintiff while the defendant was given access. These two orders were not disputed and I hereby confirm them. Section 88(4) allows for a split custody order. Hence, in respect of the custody of Yishern, on the foregoing grounds, I order that custody be given to the defendant and the plaintiff is given access on every Saturday between 10am and 6pm.

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Order accordingly.

Reported by Herman LH Poon

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